

UNITED STATES OF AMERICA

v.

JOHN W. NICOLL

IBLA 70-374

Decided February 14, 1972

Appeal from decision of Graydon E. Holt, hearing examiner, affirming reduction of grazing privileges, California R-1-68-1.

Affirmed in part; remanded in part.

Grazing Permits and Licenses: Cancellation and Reductions

A district manager is authorized to impose a downward adjustment of authorized grazing use by a licensee so as to conform such use to the established grazing capacity of an allotment, and he is not bound to follow recommendations of a district advisory board that a lesser reduction be imposed.

Grazing Permits and Licenses: Cancellation and Reductions

When necessary to reach the proper stocking rate of an allotment, a reduction in grazing privileges from 1825 AUM's to 324 AUM's in a single year may be construed as not imposing serious hardship upon a licensee whose grazing use of the allotment in the years immediately prior to imposition of the cut did not greatly exceed 324 AUM's and whose operation consists wholly of running steer calves bought in the fall of the year and sold during the following summer.

Grazing Permits and Licenses: Range Surveys

Where the weight of expert testimony at a hearing relating to the reduction of grazing privileges indicates the carrying capacity is greater than the figure established by a Bureau of Land Management range survey, the case will be remanded for further study to determine accurately the actual carrying capacity of the allotment in question.

APPEARANCES: Stephen E. Wall (Wall & Byrum) for the appellant; E. Kendall Clarke, Office of the Solicitor, U.S. Department of the Interior, for the Government.

OPINION BY MR. HENRIQUES

John W. Nicoll has appealed to the Director, Bureau of Land Management from a decision dated July 31, 1969, wherein a hearing examiner dismissed his appeal from a decision of the Bakersfield District Manager. 1/

The district manager's decision of February 23, 1968, denied Nicoll's application to graze 223 cattle and four horses on the Nicoll individual allotment from March 1, 1968, to June 15, 1968, and from October 16, 1968, to February 28, 1969, for a total of 1,825 AUM's because as the result of a range survey inventory the carrying capacity of the allotment had been determined to be 324 AUM's. The grazing privileges for 1968 were allowed for only 324 AUM's equal to the carrying capacity of the allotment. But the proviso was made that as the grazing capacity of the allotment improved and when conditions warrant, Nicoll would have a preference right to such increased grazing to the extent of and proportionate to his qualifications. The district manager's action was stated to have been taken pursuant to 43 CFR 4115.2-1(e)(3) and (e)(13)(2).

Nicoll appealed from the district manager's decision setting forth these grounds of error: His application is not in excess of the grazing capacity of his allotment, the imposition of the entire reduction at one time is a hardship contrary to 43 CFR 4111.43(d), the decision is contrary to the advisory board recommendation, the grazing capacity of 324 AUM's is in error as an earlier study showed 2,034 AUM's, the range inventory study to set the grazing capacity at 324 AUM's was made at the wrong season of the year, and finally, the grazing management plan is incorrect.

It was stipulated at the hearing that the Nicoll individual allotment consists of 4,572 acres in the Kern grazing unit and encompasses all of the federal range qualifications of John W. Nicoll. The individual allotment was granted in 1944 at the request of Nicoll and has been used by him for grazing cattle and horses from October 16 to June 15, annually. He has been licensed in each of the three years prior to the hearing to use 1,825 AUM's of grazing.

Four issues were formulated at the hearing and discussed in the decision below.

(1) What is the carrying capacity of the allotment?

1/ The Secretary of the Interior in the exercise of his supervisory authority transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals effective July 1, 1970. Circular 2273, 35 F.R. 10009, 10012.

- (2) Should the stock adjustment downward be imposed over a three year period or a one year period?
- (3) Is it proper for the district manager to issue a decision contrary to the advisory board recommendation?
- (4) Does the applicant's acceptance of a license for 1,825 AUM's for several years preclude the Bureau of Land Management from reducing the license now to 324 AUM's?

The first two issues involved questions of fact, the latter two issues, questions of law.

There was no testimony given on the third or fourth issues. The Taylor Grazing Act, as amended, provides that the Secretary of the Interior may appoint district advisory boards who shall offer advice and make a recommendation on each application for a grazing permit within its district. 43 U.S.C. § 315o-1 (1970). The functions and duties of district advisors are set forth in 43 CFR 4114.1-5 (1971). The procedures to be followed when the district manager disagrees with a favorable recommendation by the advisory board are set forth in 43 CFR 4115.2-1(a)(4) (1971). See Harvey Brothers, I.G.D. 464 (1947); F. Ray Clements, 56 I.D. 360 (1938). The hearing examiner correctly held that the district manager is authorized to issue decisions contrary to the advisory board recommendation.

After considering evidence presented, the hearing examiner concluded that the grazing capacity of the Nicoll allotment had been determined by a survey conducted in accordance with the Bureau of Land Management procedures and that reduction from 1,825 AUM's to 324 AUM's in a single year was within the discretionary authority of the district manager.

The appellant contends the hearing examiner's decision is not supported by the evidence and is contrary to the law. He asserts the reduction in grazing will put him out of business. He contends that it is a great hardship to be reduced from 1,825 AUM's to 324 AUM's and if a reduction in AUM's is necessary it should be phased over a three year period. He further contends the advisory board recommendation of 1,248 AUM's was closer to the true carrying capacity than the district manager's determination of 324. He asserts the carrying capacity was computed by use of an assumed forage acre factor. He has suggested that a cursory examination was made by Jennings rather than an extensive study as cited in the Adams decision mentioned in the hearing examiner's decision. He takes exception to the hearing examiner's statement that there was no testimony given on the two issues of law. He asserts the district manager did not ask the board for its recommendation on the matter of a three year or one year period to achieve the reduction in grazing.

We look at the appellant's contention that the reduction will put him out of business and in any event, the reduction in grazing privilege should have been imposed over the three year period. The pertinent regulation provides:

(d) When the District Manager, after recommendation by the district advisory board, determines that the imposition of the full amount of downward adjustment in authorized active use necessary to reach the proper stocking rate of a Federal range area would impose a serious hardship on the range users, he is not required to impose the full amount of the adjustment forthwith, but will schedule a percentage of the required adjustment during each of the three years immediately following the District Manager's determination as the circumstances in each case may warrant, except that when the total adjustment is less than 15 percent of the total authorized active use, it will be imposed forthwith in the full amount. 43 CFR 4111.4-3(d).

Testimony at the hearing was to the effect that the Nicoll livestock operations were limited to feeding steers which he buys in the fall and grazes on his patented lands and the federal range until the following summer and then he sells. It was developed that in recent years Nicoll had not used the federal range to the full extent of his permit for 1,825 AUM's. Testimony indicated that Nicoll used only 479 AUM's in the 1967-68 grazing season, based on 186 steer calves and 3 horses. Nicoll presented nothing to show that he had made greater use of the federal range under his permit. He explained that economic pressures had prevented him from getting more cattle in recent years. The district manager testified that he felt the reduction from 1,825 AUM's to 324 AUM's was not as severe as might appear at first blush, since Nicoll had not demonstrated grazing use of his allotment even remotely approaching 1,825 AUM's during any of the several years immediately preceding the hearing. In this circumstance we agree with the hearing examiner that a reduction in grazing permit from 1,825 AUM's to 324 AUM's in one year would not be a hardship on Nicoll within the ambit of 43 CFR 4111.4-3(d).

Although the District Advisory Board had recommended a reduction only from 1825 AUM's to 1249 AUM's total active use on the Nicoll allotment, the district manager declined to follow this recommendation since he was persuaded that the actual carrying capacity of the allotment was only 324 AUM's. This action by the district manager was within his authority as decisions of a district advisory board are not binding upon the District manager, who is authorized to follow or reject the recommendations of the board. See Harvey Brothers, A-24482 (March 28, 1947).

We turn now to the appellant's contention that the grazing capacity of 324 AUM's is incorrect. Employees of the Bureau testified that the carrying capacity was established after a systematic study of the allotment in which accepted standards were employed. If the standards are valid and if the survey was conducted in accordance with proper standards, the conclusion that the grazing capacity was correctly determined is inescapable.

We elicit from the transcript the following:

Robert E. Jennings, a range conservationist employed by BLM, testified that he had been in that position for 6 years and 3 months, that most of his experience on range surveys had been in northern California and that the Nicoll allotment survey was the first he had ever done in the Bakersfield District. He stated that he and an assistant had spent 4 days on the Nicoll allotment, using the ocular reconnaissance method of survey, estimating percentage composition of the vegetation and of the total forage density on several transects through the allotment. From this survey Jennings concluded that the range is in a declining condition, on a downward trend, with a present grazing capacity of only 324 AUM's, that there is an invasion of undesirable plant species, that the range is overgrazed, that desert needlegrass is the key species on the allotment, and that the goal of proper management of the range should be to increase the perennial grass over the present annual species.

Ernest Twisselmann, a rancher with more than 30 years experience in the vicinity as well as semi-professional interest in the vegetation of the San Joaquin Valley areas as a research associate of the California Academy of Sciences, testified that he had examined the Nicoll allotment in April 1968, on the day prior to Jennings' visit, and observed the vegetation to be in excellent condition, with only partial use by the grazing livestock. He noted no evidence of severe use or improper grazing. The annual growth was very impressive. He stated that he did not consider desert needlegrass to be an important forage grass on ranges such as the Nicoll allotment. He had not noted any serious invasion of undesirable plants, nor presence of alien weeds not palatable to cattle.

Edmund J. Woolfolk, a retired employee from the United States Forest Service, with more than 31 years in range management activities, including Assistant Chief, Division of Range Management, Washington, D.C., and Assistant Director, Pacific Southwest Forest and Range Experiment Station, Berkeley, California, testified that he had examined the Nicoll allotment in April 1968, and had observed good growth on the vegetation, with signs of utilization by livestock. He was unable to determine any trend of range conditions unless he could make continuing studies of the soil and vegetation over a protracted period of time, with a minimum of 5 years. He stated there was substantial amount of forage at the time of his observation in

April. He noted some shrubs, but was unable to tell if they were the result of overgrazing. He gave his opinion that the Nicoll allotment is not adapted for perennial grass, but rather is an annual type of range.

Roy B. Parker, Kern County Farm Advisor for the past 22 years, testified that he had visited the Nicoll allotment on several occasions during the spring of 1968, in company variously with Nicoll, Twisselmann, and the District Manager, Robert J. Springer. He said the range looked good and as if there would be feed remaining at the end of the grazing season. He saw no evidence of overgrazing in the current year. In his opinion, annuals are the most important plants for grazing in Kern County, and that perennial grasses are only of secondary importance.

The rebuttal testimony adduced by the contestee is directly contrary to that presented by the contestant on almost every fact pertaining to the grazing capacity and condition of the Nicoll allotment and to its management for annual or perennial grasses. Moreover, the expert qualifications of the appellant's witness are impressive, requiring that considerable weight be accorded their testimony. Nevertheless, while testimony of the expert witnesses on behalf of Nicoll supports the contention that the carrying capacity is actually greater than 324 AUM's, none of the rebuttal witnesses set any definite figure for the actual capacity. Further study is necessary before the actual carrying capacity of the land can be accurately determined.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), we affirm the hearing examiner's findings that the district manager can issue decisions contrary to the recommendations of his Advisory Board where he is supported by facts, that the Bureau is not precluded from reducing a long-time grazing license from 1825 AUM's to a figure compatible with the present carrying capacity of the allotment, and that the total reduction in licensed AUM's may be accomplished in one year where it is not apparent that the reduction would result in undue hardship on the licensee. We do not affirm the determination that the carrying capacity of the Nicoll allotment is only 324 AUM's, but remand the case to the Bureau of Land Management for it to make a new range survey of the allotment and then to take appropriate action in conformance therewith.

Douglas E. Henriques, Member

We concur:

Frederick Fishman, Member

Edward W. Stuebing, Member

